

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
FreePage Corporation)
)
)
Request For Waiver of Section 22.323,)
Experimental License, and)
Developmental License)

ORDER

Adopted: February 8, 2000

Released: February 9, 2000

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

Introduction

1. FreePage Corporation (“FreePage”), a paging licensee, has filed a petition for rulemaking (“Petition”) and a Supplemental Petition (“Supplemental Petition”) requesting that the Commission amend its rules to permit paging licensees to use their assigned channels to broadcast audio programming of interest to a narrow or specialized audience, including, but not limited to, persons who are visually disabled, which FreePage refers to as Limited Program Distribution Service (“LPDS”).¹ In these petitions, FreePage also requested a waiver of the applicable Commission rules, a developmental license, and an experimental license so that it could provide LPDS service. For the reasons discussed below, we deny FreePage’s request for a waiver, developmental license, and experimental license. We note that the Wireless Telecommunications Bureau (“Bureau”) is concurrently issuing a Public Notice seeking comments on FreePage’s Petition to amend Section 22.323 of the Commission rules to provide LPDS.²

¹ FreePage Corporation, Petition for Rulemaking, filed October 9, 1997; FreePage Corporation, Supplemental Petition, Petition for Rulemaking, Waiver, Developmental, or Experimental License, filed October 26, 1998.

² *Wireless Telecommunications Bureau Seeks Public Comment on Petition to Amend Section 22.323 to Allow CMRS Licensees to Provide Limited Program Distribution Service*, Public Notice, DA 00-160

Background

2. FreePage holds commercial mobile radio service (“CMRS”) authorizations in the Paging and Radiotelephone Service for paired channels in the 152/158 MHz and 454/459 MHz bands. Currently, these channels are allocated for assignments to common carriers for the provision of land mobile or fixed radio telecommunications services on a commercial basis.

3. In its 1997 Petition, FreePage requests that the Commission amend Section 22.323 of the Commission’s rules to permit licensees in the Paging and Radiotelephone Service to use their assigned channels to broadcast LPDS to a narrow, or specialized, public audience. According to FreePage, each user would have to purchase a scanner to receive broadcasts. FreePage would receive a “fee for transmission services rendered, on a negotiated basis.”³ To the extent that LPDS is offered, it would replace FreePage’s use of its channels to provide commercial paging services.⁴ FreePage urges that LPDS-type broadcasts are needed because various economic factors have dramatically reduced the availability of so-called narrowcasts, or broadcasts of programming material targeted to a limited audience. FreePage asserts that ownership costs of radio stations have risen, effectively precluding ownership of such stations by narrowcasters. At the same time, FreePage asserts that there has been a decrease in the availability of FM broadcast station subcarriers (FM Subsidiary Communications Authorizations or “SCAs”) capable of providing an LPDS-type service. As noted above, FreePage’s Petition has been placed on public notice.

4. On October 26, 1998, FreePage filed its Supplemental Petition seeking either a waiver of Section 22.323, or a developmental or experimental license to provide LPDS.

Discussion

5. FreePage’s petitions do not clearly set forth the relief sought from the Commission’s regulations. In part because FreePage is a *pro se* petitioner, we are liberally construing FreePage’s Petitions and treating them as separate requests for the following Commission actions: (a) a rulemaking to amend Section 22.323 of the Commission’s rules to permit Paging and Radiotelephone Service licensees to use their assigned channels for “incidental communications” to provide LPDS-type service; (b) a waiver of Section 22.323 of the Commission’s rules in the event the Commission decides not to initiate a rulemaking to amend Section 22.323; (c) an experimental license; and (d) a developmental license. The Bureau is releasing a Public Notice seeking comments on FreePage’s Petition insofar as it requests rule amendments. For the reasons discussed below, this order denies FreePage’s waiver, experimental license, and developmental license requests.

6. Waiver Request. FreePage seeks a waiver of Section 22.323 of the Commission’s rules⁵

(February 9, 2000).

³ Supplemental Petition at 4.

⁴ *Id.*

⁵ Section 22.323, “Incidental communication services,” reads as follows:

so that it can begin providing LPDS in several cities. Section 1.925, “Waivers,” sets forth the Commission’s standards for granting waivers. It provides that waivers may be granted if the petitioner has shown:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

47 C.F.R. Section 1.925(b)(3).

7. FreePage’s waiver request fails to meet either standard. First, FreePage has not demonstrated that application of the rule here would frustrate its underlying purposes, or that grant of its party-specific waiver request would be in the public interest. This is partly because FreePage’s request does not provide sufficient information to determine what type of service LPDS is (*e.g.*, CMRS fixed wireless or broadcast), so it is not clear what rule waivers would be necessary. The information the Bureau receives in response to the public notice seeking comment on FreePage’s Petition for rule changes should clarify the nature of the proposed service and the rules implicated. Moreover, in a pending rulemaking, the Commission is considering the appropriate regulatory treatment for CMRS fixed wireless carriers, as well as a request to eliminate or modify Section 22.323.⁶ Granting FreePage a party-specific waiver could prejudice the Commission’s actions in this rulemaking.

8. Second, FreePage has failed to show that it is subject to “unique or unusual factual circumstances” not applicable to other paging licensees that warrant granting its waiver request. Indeed,

Carriers authorized to operate stations in the Public Mobile radio services may use these stations to provide other communications services incidental to the primary public mobile service for which the authorizations were issued, provided that:

- (a) The costs and charges of subscribers who do not wish to use incidental services are not increased as a result of provision of incidental services to other subscribers;
- (b) The quality of the primary public mobile service does not materially deteriorate as a result of provision of incidental services, and neither growth nor availability of the primary public mobile service is significantly diminished as a result of provision of incidental services;
- (c) The provision of the incidental services is not inconsistent with the Communications Act of 1934, as amended, or with FCC rules and policies; and
- (d) The licensee notifies the Commission using FCC Form 601 before providing the incidental services. This notification must include a complete description of the incidental services.

⁶ *Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, WT Docket No. 96-6, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8965 (1996); *Petition for Partial Reconsideration by BellSouth*, 12 FCC Rcd 15266 (1997) (arguing that Section 22.323 is inconsistent with increased regulatory flexibility given to CMRS carriers to provide fixed wireless services).

throughout FreePage's petitions, it relies on an industry-wide decrease in demand for paging services as a basis for allowing CMRS licensees to provide LPDS. We find that this does not constitute a unique or unusual factual circumstance required for a waiver of Section 22.323 of the Commission's rules. Deciding the broader question of whether Section 22.323 or other Commission rules should be amended or eliminated to permit CMRS licensees to provide LPDS generally is more properly the subject of a rulemaking.

9. In addition, granting FreePage's request may not be in the public interest for other reasons. Currently, the Commission is considering a rulemaking to allocate the 455-456 MHz and 459-460 MHz frequency bands to non-voice non-geosynchronous low-Earth orbiting satellite service ("Little LEO service").⁷ If FreePage were permitted to offer LPDS service on its 459 MHz channels without coordinating its use of this spectrum, there is a potential for interference to users of Little LEO service mobile earth terminals ("METs") operating in this band. Little LEO service METs plan to use the 459 MHz band for intermittent uplink transmissions to Little LEO satellites. Continuous LPDS transmissions in the 459 MHz band could preclude such intermittent uplink transmissions by METs because the spectrum would be in constant use by LPDS service providers and, therefore, unavailable for use by Little LEO service METs. The preclusion of Little LEO service could occur in those geographic areas currently within the footprint of a Little LEO service satellite where LPDS service providers are operating. Without more information about the potential for interference between FreePage's proposed LPDS service and the Little LEO service proposed for the 459 MHz band, we conclude that it also would be premature and not in the public interest to grant a waiver for LPDS operation in this band.

10. Experimental License Request. FreePage also requests an experimental license for LPDS. Section 5.201 of the Commission's rules addresses the requirements for experimental licenses. It provides that "[a]uthorizations for stations in the Experimental Radio Service will be issued only to persons qualified to conduct experimentations utilizing hertzian waves for scientific or technical operation data . . . in connection with research projects when existing communication facilities are inadequate."⁸ The rule explicitly provides that experimental licenses be used for scientific or technical experiments. LPDS is not a scientific or technical experiment; FreePage is simply proposing to replace its commercial paging systems with another commercial service. As a result, LPDS does not satisfy the requirements for an experimental license.

11. Developmental License Request. Finally, FreePage's request can be construed as one for a developmental license. A developmental license may only be granted for uses consistent with existing spectrum allocations; "[r]equests to use any portion of the spectrum for a service or purpose other than that indicated in the Table of Frequency Allocations . . . may be made only in accordance with the provisions of part 5 of this chapter," which is the section relating to experimental licenses.⁹ The spectrum FreePage is licensed to use is allocated to land mobile and fixed services. It is not clear from FreePage's

⁷ *Amendment of Part 2 of the Commission's Rules to Allocate the 455-456 MHz Bands to the Mobile-Satellite Service*, Notice of Proposed Rulemaking, 13 FCC Rcd 3428 (1997).

⁸ 47 C.F.R. § 5.201(a).

⁹ 47 C.F.R. § 22.409(a)(1).

petitions whether the LPDS service proposed by the company is a land mobile, fixed, or broadcast service. Because the Public Notice that the Bureau is releasing concurrently with this order seeks comment on this issue, it would be premature to make a determination whether the LPDS service proposed by FreePage is consistent with the existing spectrum allocations for the 152/158 MHz and 454/459 MHz bands. Therefore, we conclude that FreePage's request for a developmental license should be denied.

12. Accordingly, IT IS ORDERED that, pursuant to authority delegated by Sections 4(i) and 405 of the Communications Act, as amended, 47 U.S.C. Sections 154(i), 405, and sections 0.331 and 1.106 of the Commission's Rules, 47 C.F.R. Sections 0.331 and 1.106, the petitions filed by FreePage Corporation on October 9, 1997 and October 26, 1998, are DENIED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari
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